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(2)

No. 10-497

In the Supreme Court of the United States

FRANCIS GATIMI, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412, authorizes courts in certain contexts to award attorney's fees and other expenses to the prevailing party in a civil action brought by or against the United States if the court determines that the "position of the United States" was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). The term "position of the United States" is defined as "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). The questions presented are as follows:

1. Whether the "position of the United States" includes one portion of the rationale of an order by an immigration judge, where the prevailing party filed its civil action for judicial review of a subsequent order of the Board of Immigration Appeals that did not adopt that portion of the immigration judge's rationale.

2. Whether a court must conclude that the position of the United States was not "substantially justified" if it finds that the government's position was not justified with respect to only one issue in the litigation, even if the court concludes that the government's position regarding the more prominent issue in the case was substantially justified.

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OPINION BELOW

The order of the court of appeals (Pet. App. 35a-44a) denying an award of attorney's fees is reported at 606 F.3d 344.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2010. A petition for rehearing was denied on July 12, 2010 (Pet. App. 45a). The petition for a writ of certiorari was filed on October 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Administrative removal proceedings generally involve two levels of agency adjudication within the Department of Justice. First, an official from the Department of Homeland Security initiates removal pro-

ceedings before an immigration judge, who exercises authority delegated by the Attorney General. See 8 U.S.C. 1229(a), 1229a(a); 8 C.F.R. 239.1, 1003.10, 1003.14. After considering the evidence produced during the proceedings, the immigration judge decides whether the alien is removable from the United States. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12; cf. 8 U.S.C. 1229a(e)(2) (defining "removable" to mean inadmissible or deportable). If the immigration judge orders the alien removed, the alien (with exceptions not relevant here) may file an administrative appeal to the Board of Immigration Appeals (Board). See 8 C.F.R. 1003.1(b), 1003.3, 1240.12(c), 1240.15.

If the alien fails to appeal timely to the Board and the Board does not certify the case for its own review, the immigration judge's order of removal becomes final. 8 U.S.C. 1101(a)(47)(B)(ii); 8 C.F.R. 1003.39, 1240.14. Otherwise, the Board exercises its "independent judgment and discretion in considering and determining the case[]" pursuant to the authority delegated to it by the Attorney General. 8 C.F.R. 1003.1(a)(1), (d)(1)(ii) and (3). If the Board affirms (and if the case is not referred to the Attorney General for his further review), the order of removal becomes final upon entry of the Board's decision. 8 U.S.C. 1101(a)(47)(B)(i); 8 C.F.R. 1003.1(d)(7) and (h).

b. An alien may file a civil action for judicial review only from a "final order" of removal, 8 U.S.C. 1252(a)(1) and (b)(9), and only if the "alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1); see 8 U.S.C. 1252(g). Such a petition for review is filed directly in an appropriate court of appeals. 8 U.S.C. 1252(a)(5) and (b)(2).

c. The Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325, as amended, authorizes the court in a civil action brought by or against the United States to award to a "prevailing party" (other than the United States) fees and other expenses incurred by that party if the "position of the United States" was not "substantially justified" and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A). EAJA imposes four eligibility requirements for such an award: (1) the claimant must file an appropriate fee application; (2) the claimant must be a prevailing party; (3) the position of the United States must not be "substantially justified"; and (4) special circumstances must not make an award unjust. *Commissioner, INS* v. *Jean*, 496 U.S. 154, 158 (1990).[1]

With respect to the requirement that the "position of the United States" must not be "substantially justified," 28 U.S.C. 2412(d)(1)(A), EAJA defines the term "position of the United States" to mean "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). In addition, this Court has "held that the term 'substantially justified' means 'justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person.'" *Jean*, 496 U.S. at 158 n.6 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988)). The Court has

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[1] In the immigration context, EAJA authorizes courts to award fees and expenses incurred by the prevailing party only in certain judicial proceedings. It does not allow similar awards for fees and expenses incurred in administrative removal proceedings. See *Ardestani* v. *INS*, 502 U.S. 129, 139 (1991); cf. 5 U.S.C. 504 (EAJA provision authorizing awards of fees and other expenses incurred in certain administrative proceedings).

also explained that "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA * * * favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162. In other words, in determining whether the government's position was "substantially justified" for purposes of an EAJA award, "only one threshold determination for the entire civil action is to be made." *Id.* at 159.

2. a. Petitioners are natives and citizens of Kenya who were admitted to the United States as temporary non-immigrant visitors. Pet. App. 1a-2a. Petitioners did not depart the United States when their visas expired, and they subsequently were placed in removal proceedings. *Id.* at 2a. After removal proceedings had been initiated, petitioners sought the discretionary relief of asylum as a defense to removal based on petitioner Francis Gatimi's claim of refugee status. Cf. 8 U.S.C. 1158(c)(1) (asylum status precludes removal); 8 U.S.C. 1158(b)(3)(A) (spouse and children of an alien may be granted derivative asylum status if the alien "is granted asylum"); 8 C.F.R. 1208.21.

With exceptions not relevant here, an alien qualifies as a "refugee" eligible for asylum if he establishes, *inter alia*, that he was persecuted or has a well-founded fear of persecution "on account of * * * membership in a particular social group." 8 U.S.C. 1101(a)(42)(A), 1158(b)(1)(B). Francis Gatimi's asylum claim (on which the other petitioners' derivative asylum status depended) was based on his contention that he had joined a Kenyan group called the Mungiki and that, after he left that group, he had suffered persecution at the hands of the Mungiki because he was a "former member[] of the Mungiki." Pet. App. 6a, 23a.

b. The immigration judge found petitioners to be removable, denied asylum, and ordered petitioners to be removed. Pet. App. 1a-13a. As relevant here, the immigration judge first concluded that petitioners had not demonstrated eligibility for asylum based on membership in a "particular social group" because the Mungiki did not meet the "social [v]isibility" criteria for such groups reflected in the Board's decisions. *Id.* at 8a. In addition, the judge ruled that the mistreatment that Francis Gatimi had experienced in Kenya was not sufficiently severe to qualify as past "persecution." *Id.* at 9a.

c. The Board affirmed, and it denied petitioners' motion to remand the case to the immigration judge. Pet. App. 14a-21a.

As relevant here, the Board held that, "even if [Francis Gatimi had] established that his past harm amounts to persecution," he nevertheless "failed to meet his burden of proof for asylum" because he "failed to establish that former members of Mungiki constitute a 'particular social group.'" Pet. App. 16a. The Board explained that its prior decisions had "emphasized that the purported group's social visibility—i.e., the extent to which members of a society perceive those with the characteristic in question as members of a social group—is of particular importance" in the analysis. *Id.* at 17a. The Board "agree[d] with the Immigration Judge that [Francis Gatimi's] former Mungiki membership lacks the requisite social visibility to establish that he is a member of a 'particular social group.'" *Ibid.* The Board also explained that, "to the extent that [Francis Gatimi] fears that his wife will be subjected to female genital mutilation upon her return to Kenya," "he failed to present sufficient testimonial or documentary evidence to estab-

lish that a reasonable person [in his position] would fear persecution in Kenya on this basis." *Id.* at 18a.

d. The court of appeals vacated the order of removal and remanded the case for further proceedings. Pet. App. 22a-34a.

The court of appeals first described the factual and procedural background of the case, including the decision of the immigration judge. Pet. App. 22a-25a. In that description, the court characterized as "absurd" the immigration judge's conclusion that Gatimi's mistreatment did not constitute "persecution." *Id.* at 25a. The court of appeals explained, however, that "[t]he Board did not reach the question whether [Francis] Gatimi had been persecuted," and that the Board had instead rested its removal decision on two other grounds: (1) "the Mungiki are not a particular social group" and (2) Francis Gatimi had failed to present sufficient evidence to show that a "reasonable person" in his position would "fear persecution in Kenya" based on his wife's "fear of female circumcision." *Id.* at 25a-26a. The court disagreed with both rulings. *Id.* at 26a-34a.

First, the court of appeals rejected the Board's conclusion that, because the Mungiki did not satisfy the Board's "social visibility" requirement, they did not constitute a "particular social group" within the meaning of the asylum statute. Pet. App. 26a-32a. The court explained that the Board's analysis in this case could not be "squared" with the court of appeals' prior decision in *Sepulveda* v. *Gonzales*, 464 F.3d 770 (7th Cir. 2006), which gave examples of various categories of people that qualify as "particular social group[s]." Pet. App. 26a-28a. The court also found the Board's reasoning to be insufficient, and it declined to defer to the Board's interpretation of the Immigration and Nationality Act be-

cause, in the court's view, the Board's decisions had not been consistent in their "particular social group" analysis. *Id.* at 28a-29a. The court of appeals recognized that its "sister circuits have generally approved 'social visibility' as a criterion for determining whether an asylum seeker was persecuted for belonging to a particular social group," but it explained that, while it did not "quarrel" with the particular holdings of those cases, it declined to adopt their reasoning. *Id.* at 29a-30a.

Second, the court of appeals found Francis Gatimi's asylum claim to be supported by his wife's fear of genital mutilation in Kenya. Pet. App. 32a-34a. The court recognized that Mrs. Gatimi did not file her own timely asylum claim on the basis of that fear. *Id.* at 32a. The court reasoned, however, that the "[g]enital mutilation of one's wife * * * is a way to punish [the husband]," and that "the menace to Mrs. Gatimi" is therefore "a legitimate component of Mr. Gatimi's [asylum] case." *Id.* at 33a. The court concluded that the record evidence supported the contention that Mrs. Gatimi would risk genital mutilation by the Mungiki if she were to return to Kenya, and that the evidence bolstered her claim that "she too is faced with a threat of persecution." *Id.* at 33a-34a.

3. Petitioners subsequently moved for attorney's fees and costs under Section 2412(d) of EAJA, 28 U.S.C. 2412(d). The court of appeals denied the motion. Pet. App. 35a-44a. The court explained that EAJA does not permit an award of attorney's fees and costs if "the court finds that the position of the United States was substantially justified," *id.* at 35a (quoting 28 U.S.C. 2412(d)(1)(A)), and it concluded that the government's position in this case "was substantially justified as a whole," *id.* at 43a.

First, the court of appeals held that the portion of the immigration judge's decision that the court of appeals had labeled as "absurd" is not a part of the "position of the United States." Pet. App. 36a-39a. The court explained that the courts of appeals have viewed the "position of the United States" as including the "Board's decision" in immigration cases, *id.* at 36a-37a, and that the Board here did not adopt the relevant portion of the immigration judge's decision regarding past persecution and instead rested its removal order on other grounds. *Id.* at 37a-38a. The court further observed that "[t]he *Chenery* doctrine binds the government's lawyers in judicial review proceedings to the grounds of the agency's decision," and that both "the Board and the government's lawyer rejected" the pertinent portion of the immigration judge's decision in this case. *Ibid.* For those reasons, the court concluded, the immigration judge's past-persecution ruling was but "a stumble on the way to the formulation" of the position of the United States and "is not an adequate basis for an award of fees." *Id.* at 38a.

Second, the court of appeals held that the government's position was "substantially justified." Pet. App. 38a-43a. The court explained that, although it had disagreed with the government on the first, "more prominent issue" regarding the role of "social visibility" in determining whether the Mungiki are a "particular social group," the government's position in that regard was substantially justified and supported by the decisions of "five other circuits [that] had approved the social-visibility criterion." *Id.* at 38a-39a, 43a. In contrast, the court found that the government's position on the other issue (concerning the relationship of Mrs. Gatimi's fear of persecution to Mr. Gatimi's asylum

claim and the other petitioners' derivative asylum status) was not substantially justified. *Id.* at 40a-41a. The court of appeals noted the possibility that a court might "allocate fees across issues" where the government's position is substantially justified only on some issues. *Id.* at 41a. The court explained, however, that it was aware of no precedent supporting that approach, *ibid.*, and that this case did not provide an appropriate vehicle "to try to resolve the issue" because petitioners "want all or nothing" and did not seek such an "allocation," *id.* at 43a.

The court of appeals further explained that courts of appeals have read EAJA to require an assessment of "whether the government's position was substantially justified as a whole." Pet. App. 41a. The court also noted this Court's statement that EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items," even though particular "postures on individual matters may be more or less justified." *Ibid.* (quoting *Jean*, 496 U.S. at 161-162); see pp. 3-4, *supra*. The court concluded that, because "[t]he social-visibility issue was the more prominent" one in this case and "the government's position on that issue was substantially justified," "the government's position was substantially justified as a whole" and EAJA fees were unwarranted. *Id.* at 43a.

ARGUMENT

Petitioners contend (Pet. 8-12) that the "position of the United States" includes the rationale of an immigration judge, even when the Board does not adopt that reasoning. Petitioners also argue (Pet. 12-17) that the court of appeals erred in finding the position of the United States to be substantially justified. The court of

appeals correctly rejected petitioner's request for EAJA fees, and its decision does not conflict with any decision of this Court or any other circuit. Further review is not warranted.

1. The court of appeals correctly held that the "position of the United States" in an immigration case does not include those portions of an immigration judge's ruling that the Board of Immigration Appeals declines to adopt. Pet. App. 38a. Petitioners' contrary contentions (Pet. 8-12) do not warrant further review.

EAJA defines the term "position of the United States" to include "the action or failure to act by the agency *upon which the civil action is based.*" 28 U.S.C. 2412(d)(2)(D) (emphasis added). That definition makes clear that the "position of the United States" "does not include mere preliminary * * * decisions of the agency which would not be subject to judicial review." H.R. Rep. No. 120, 99th Cong., 1st Sess. 13 (1985). Rather, only "the agency action or failure to act that gave rise to the party's right to bring the action in a federal court" is pertinent. *Ibid.* In the immigration context, because an alien subject to an order of removal must exhaust his administrative remedies by appealing to the Board, the "final" order of removal subject to judicial review is the order of removal *as affirmed by the Board.* See p. 2, *supra.* If the Board does not adopt particular aspects of an immigration judge's decision, those aspects are not part of the agency action "upon which the [alien's subsequent] civil action is based."

That conclusion flows directly from the Court's decision in *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), which held that a court of appeals should not resolve an issue resolved by an immigration judge when the Board concludes that it "need not address" the issue in light of

the Board's other rulings in the case. See *id.* at 13, 15. In such contexts where "[t]he B[oard] has not yet considered [an] issue," the "court of appeals should remand a case to an agency for decision" on the unresolved issue because the entity with delegated authority to speak for the agency has yet to "bring its expertise to bear upon the matter." *Id.* at 16-17; see *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); Pet. App. 37a (discussing the *Chenery* doctrine).

The courts of appeals likewise regularly conclude that the rationale of an immigration judge is not part of the agency action under review unless the Board adopts or otherwise incorporates that reasoning. See, *e.g.*, *De Leon-Ochoa* v. *Attorney Gen.*, 622 F.3d 341, 348 (3d Cir. 2010) ("When the Board issues its own opinion, as here, and does not adopt the [immigration judge]'s findings, we review only the decision of the Board."); *Todorovic* v. *U.S. Attorney Gen.*, 621 F.3d 1318, 1324 (11th Cir. 2010) ("Where the B[oard] issues its own opinion, we review only that opinion, except to the extent that it expressly adopts the immigration judge's reasoning"); *Kone* v. *Holder*, 620 F.3d 760, 763 (7th Cir. 2010) (similar); *Long* v. *Holder*, 620 F.3d 162, 166 (2d Cir. 2010) (similar); *Hosseini* v. *Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006) (similar). Petitioners cite no contrary authority.

Petitioners contend (Pet. 11) that the court of appeals' decision conflicts with the Ninth Circuit's ruling in *Thangaraja* v. *Gonzales*, 428 F.3d 870 (2005). That is incorrect. In *Thangaraja*, the Board "summarily affirmed [the immigration judge's decision] without opin-

ion." *Id.* at 873. When the Board provides no rationale of its own in affirming an order of removal, the courts have treated the reasoning of the immigration judge as the rationale for the agency decision. See, *e.g.*, *Halim* v. *Holder*, 590 F.3d 971, 975 (9th Cir. 2009) ("Where, as here, the B[oard] affirms an [immigration judge]'s decision without an opinion, we review the [immigration judge]'s decision as if it were the B[oard]'s decision."). The court in *Thangaraja* accordingly concluded that, under EAJA, the position of the United States includes "the B[oard] and [immigration judge] decisions *we review*," 428 F.3d at 873 (emphasis added), because the court necessarily reviewed the reasoning of the immigration judge as the only articulated rationale for the agency's action. That reasoning has no application where, as here, the Board issues its own decision for the agency and declines to adopt a particular aspect of the immigration judge's reasoning.[2]

2. The court of appeals also correctly determined that the position of the United States in this case was "substantially justified" under EAJA. Pet. App. 38a-43a. That substantial-justification determination may be overturned only for an abuse of discretion, *Pierce* v. *Underwood*, 487 U.S. 552, 557-563 (1988), and petitioners do not appear to argue that the court of appeals abused its discretion in evaluating the government's

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[2] Petitioners assert (Pet. 12) that the court of appeals' decision is "in tension" with decisions from the Second, Third, Fifth, and Tenth Circuits. No such tension exists. The decisions that petitioners cite do not involve judicial review of final agency decisions that decline to adopt the rationale proffered by a subordinate agency adjudicator, which itself would not be subject to judicial review. In any event, even petitioners do not contend that any tension reflects a division of authority warranting this Court's review.

position as a whole. Instead, petitioners appear to contend (Pet. 12-17) that, as a matter of law, the "position of the United States" can never be "substantially justified" if a court finds that the government's contentions are not substantially justified with respect to even one issue. Petitioners thus contend that an EAJA award is required whenever a court finds substantial justification for "less than all of the issues" in a case. Pet. 12-13. That argument lacks merit and does not warrant further review.

a. In *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), this Court explained that "only one threshold determination for the entire civil action" is made under EAJA's substantial-justification standard. *Id.* at 159; see *id.* at 160 ("The single finding that the Government's position lacks substantial justification * * * operates as a one-time threshold for fee eligibility."). The Court also made clear that, although the litigants' positions "on individual matters may be more or less justified," EAJA's substantial-justification test "favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162. That conclusion follows directly from EAJA's text, which requires a court to determine whether "the position of the United States" was substantially justified, and which repeatedly refers to "the 'position' * * * in the singular." *Id.* at 159. Consistent with *Jean*, the court of appeals in this case correctly framed the relevant question as whether the government's position in the case as a whole was "substantially justified," see Pet. App. 43a, and its fact-bound resolution of that question does not warrant this Court's review.

Petitioners contend (Pet. 13-15) that the Fourth, Fifth, and Eleventh Circuits have required EAJA fees

to be awarded whenever "the position of the United States was only justified as to one of several issues" in a case. The decisions on which petitioners rely do not establish such a rule.

For example, the court in *Russell* v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985), did not (as petitioners contend) hold that EAJA fees must be awarded unless the government "was substantially justified in *all* of its litigation positions." Pet. 13. Rather, the court held that the government's "action was not substantially justified" because it found the key arguments supporting that action to be "playing games * * * with this court" and a "perversion of the truth." 775 F.2d at 1290 (citations omitted). Petitioners quote (Pet. 13-14) from a later section in the court's opinion, which addresses (in apparent dicta) how to calculate the "amount of Russell's fee award" on remand. 775 F.2d at 1291. But that discussion reflects the court's views on how to calculate a reasonable attorney's fee, not whether the government's overall position was "substantially justified." See *id.* at 1291-1292.

The Fourth Circuit's decision in *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, cert. denied, 510 U.S. 864 (1993), likewise does not support petitioners' theory. The court in *Roanoke River* concluded that a court must look to "the totality of circumstances," including "the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them," in order to "determin[e] whether the government's position in a case is substantially justified." *Id.* at 139. The court noted the possibility that "an unreasonable stance taken on a single issue may * * * undermine the substantial justification of the government's position." *Ibid.* The court explained, how-

ever, that the substantial-justification "question can be answered only by looking to the stance's effect on the entire civil action," and it emphasized that "it does not automatically follow that the government's position in the case as a whole is not substantially justified." *Ibid.* Indeed, the court of appeals in *Roanoke River* concluded that the district court had "properly considered the [government's] 'position' in its entirety" and had not abused its discretion in finding the government's "position *in the entire case*" to be substantially justified. *Id.* at 140.

The court in *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, vacated in part, 804 F.2d 1573 (11th Cir. 1986), concluded that EAJA fees were appropriate because the court found it "clear that the INS violated its own regulations and knew that it was violating them," even though the government's position as to other issues was substantially justified. *Id.* at 1499-1500. The court added that the government was "only responsible for 'that portion of the expenses attributable to its unjustified positions,'" but that the "issues were intertwined with the remaining legal theories," making a fully compensatory award appropriate. *Id.* at 1500 (citation omitted).

It is unclear from the Eleventh Circuit's pre-*Jean* opinion in *Haitian Refugee Center* whether the court concluded that the "substantial justification" analysis can be performed on an issue-by-issue basis. But, in any event, that court (after *Jean*) has recognized that the proper analysis must consider "the case as an inclusive whole." *United States* v. *Jones*, 125 F.3d 1418, 1428 (11th Cir. 1997). And, to the extent that *Haitian Refugee Center* may be viewed as analyzing the position of the United States as a whole, nothing in the opinion purports to establish a rule that fees must be awarded

whenever the government's arguments on any issue in the ligation are not substantially justified.

Petitioners contend (Pet. 16) that the Ninth Circuit has held that an EAJA award is required when "the position of the United States is only partially 'substantially justified,'" and that fees should be "allocated" to compensate litigants for the unjustified portion. That is incorrect. In *United States* v. *Rubin*, 97 F.3d 373 (9th Cir. 1996), the court stated in dicta that "[t]here may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the unjustified portion of the conduct." *Id.* at 375. But that statement supports the view that *per se* rules should not govern the analysis. Moreover, the court in *Rubin* emphasized that the case before it did "not present [the] situation" it discussed, and it concluded that the "district court did not abuse its discretion either in treating the case as a whole or in determining that the position of the government was, as a whole, substantially justified." *Id.* at 376. Nothing in *Rubin* supports petitioners' contentions or reflects a division of authority warranting this Court's review.[3]

b. In any event, for two distinct reasons, this case would be a poor vehicle to address the question that petitioners present.

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[3] Petitioners' reliance (Pet. 16) on *United States* v. *Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977 (9th Cir. 1999), is likewise misplaced. The court in *22249 Dolorosa Street* analyzed the justification for the government's position in a forfeiture proceeding that involved only one legal issue: whether the government's forfeiture action was supported by probable cause that the property had been used in illegal drug activity. See *id.* at 982-984. The court awarded fees because it found the government's position on that issue not to be substantially justified. *Id.* at 984.

First, petitioners appear to contend (Pet. 16) that this Court's review is warranted to decide whether "an EAJA award should be allocated" by separating those portions of a case for which a court determines the government's conduct was substantially justified from other portions for which the court determines the conduct was not. But the court of appeals did not pass upon that argument because petitioners did not press it in a timely manner below. Pet. App. 43a; see Pet. 17 n.2 (conceding that the court of appeals "did not address [the] allocation" argument because petitioners "did not ask for it"). And although petitioners assert that they advanced the argument for the first time in their petition for en banc rehearing, *ibid.*, such unresolved arguments raised for the first time at rehearing are forfeited because they come too late. *Indiana Gas Co.* v. *Home Ins. Co.*; 141 F.3d 314, 321 (7th Cir.), cert. denied, 525 U.S. 931 (1998); *Hebron* v. *Touhy*, 18 F.3d 421, 424 (7th Cir. 1994).

Second, the court of appeals' decision (like the second question that petitioners present) proceeds from the premise that the government's position in this case was not substantially justified regarding one of the two issues that the court resolved. Pet. App. 39a-41a. That premise is itself incorrect. The Board was substantially justified in concluding that Francis Gatimi's asylum claim "based on his former membership in Mungiki" was not supported by "sufficient * * * evidence to establish that a reasonable person would fear persecution" because his wife would "be subjected to female genital mutilation upon her return to Kenya." *Id.* at 18a.

In order to establish his own reasonable fear of persecution "on account of"—*i.e.*, caused by—his own "membership in a particular social group," 8 U.S.C.

1101(a)(42), Mr. Gatimi was required to present evidence of "his persecutors' motives." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992). And in order to overturn the Board's decision under the applicable deferential standard, Mr. Gatimi was required to make the further showing that such evidence was "so compelling that no reasonable factfinder could fail to find" a reasonable fear of persecution based on his membership in such a group. *Id.* at 483-484; see 8 U.S.C. 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."). Assuming for present purposes that the genital mutilation of one's wife for the purpose of harming the husband may constitute persecution of the husband, petitioners failed to present evidence in the administrative record (let alone sufficiently compelling evidence to warrant overturning the Board's decision) that any such action in Kenya would be "on account of" Mr. Gatimi's status as a former member of the Mungiki.

Moreover, Mrs. Gatimi did not herself seek asylum, but rather had the potential to receive derivative asylum status from her husband's asylum application (based on his own refugee status). See 8 U.S.C. 1158(b)(3)(A) (authorizing derivative asylum status to alien's spouse and children if the alien himself "is granted asylum"); 8 C.F.R. 1208.21 (derivative asylum may be granted for spouse and children of the "principal alien who was granted asylum"). Mrs. Gatimi's own fear of persecution does not alter Mr. Gatimi's burden to show that he is a refugee based on a his own reasonable fear of future persecution on account of his membership in a particular social group. At the very least, the Board's analysis of

this issue was reasonable and therefore substantially justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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